SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1000

GASTON COUNTY DYEING MACHINE COMPANY, *Petitioner*

v.

MARVIN W. BROWN, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays the Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review a decision which that Court has rendered in a case involving the parties above-named. And the petitioner respectfully shows to this Court:

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit has not yet been printed in official or unofficial reports. The opinion is, however,

printed in the Appendix to this Petition. The Court of Appeals based its decision upon its earlier decision in *Johnson v. Seaboard Air Line Railroad Company*. The opinion of the Court of Appeals in that case is likewise printed in the Appendix to this Petition, and is unofficially reported at 59 LC ¶9177 (1968).

This case came to the Court of Appeals upon an appeal from the United States District Court for the Western District of North Carolina. The Order of the District Court is printed in the Appendix to this Petition. The Order was based upon a Memorandum of Decision of the same District Court in the aforesaid case of *Johnson v. Seaboard Air Line Railroad Company*. The Memorandum of Decision in that case is, therefore, also printed in the Appendix to this Petition, and is unofficially reported at 59 LC ¶9176 (1968).

JURISDICTION OF THIS COURT

The Opinion of the Court of Appeals was rendered on November 1, 1968. The Judgment of the Court was entered the same date. Jurisdiction to review the Judgment of the Court of Appeals is conferred on this Court by the provisions of 28 U.S.C. §1254.

QUESTIONS PRESENTED FOR REVIEW

(1) May the Equal Employment Opportunity Commission disregard the express Congressional mandate that in cases before that Commission effort shall be made to eliminate alleged unlawful employment practices by informal methods of conference, conciliation and persuasion?

(2) May the Commission, admittedly not having made any such effort whatever, proceed to advise persons to take their alleged grievances into the Federal Courts?

(3) Federal litigation having been instituted, may the courts excuse the failure of the Commission to perform its required function on the basis of naked assertions made by the Commission that it has a "heavy workload" and is too busy to attempt informal conference, conciliation and persuasion?

STATUTORY PROVISIONS INVOLVED

This case requires interpretation of section 706 of Title VII of the Civil Rights Act of 1964, Public Laws 88-352, 78 Stat. 259, July 2, 1964, 42 U.S.C. §2000e-5. Pertinent subsections of section 706 are hereinafter set forth in full:

> "(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, empolyment agency, or labor organization (hereinafter referred to as the 'respondent') with a copy of such charge and shall make an investigation of such charge, provided that such

charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year."

Section 706 (a), 42 U.S.C. §2000e-5(a)

"(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) of this section (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the

respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) of this section or the efforts of the Commission to obtain voluntary compliance."

Section 706(e), 42 U.S.C. §2000e-5(e)

STATEMENT OF THE CASE

On February 1, 1966, Marvin Brown filed with the Equal Employment Opportunity Commission a charge of discrimination alleging that he had been discriminated against with respect to the upgrading and promotional practices of the Gaston County Dyeing Machine Company. On May 5, 1966, the Commission ruled that "reasonable cause" existed for the charge. On May 12, 1966, the Director of Compliance for the

Commission wrote to Marvin Brown, advising him of its ruling and stating that "The Commission will attempt to eliminate this practice by conciliation as provided in Title VII. You will be kept informed of the progress of conciliation efforts."

On the same date, in another letter by the Director of Compliance, Brown was advised that "Due to the heavy workload of the Commission, it has been impossible to undertake or to conclude conciliation efforts in the above matter as of this date. However, the conciliation activities of the Commission will be undertaken and continued." The second letter further advised Brown that he could institute a civil action in Federal District Court. Also on May 12, 1966, the Director of Compliance for the Commission wrote the Gaston County Dyeing Machine Company that "a conciliator appointed by the Commission will contact you to discuss means of correcting this discrimination and avoiding it in the future."

Notwithstanding all of the assertions made in the letters above described, conciliation efforts were never attempted by the Commission. Absolutely no effort was made by the Commission to resolve the alleged grievance by any informal methods of conference, conciliation or persuasion. No conciliator contacted the Company prior to the institution of the action in the District Court on May 31, 1966.

The United States District Court for the Western District of North Carolina made a finding of fact that no conciliation effort was made in this matter prior to the institution of the action, and accordingly dismissed the case, the Court being of the opinion

that resort to the remedy of conciliation is a jurisdictional prerequisite to the right to file and maintain a civil action under Title VII of the Civil Rights Act of 1964.

From the Order of the District Court, entered March 22, 1968, Brown appealed to the United States Court of Appeals for the Fourth Circuit.

The Court of Appeals did not disturb the finding of the District Court that no conciliation effort had been made. However, it reversed the District Court's dismissal of the case, on the basis of the Court of Appeals' recent decision in *Johnson v. Seaboard Air Line Railroad Company*. Judge Boreman dissented for the same reasons set forth in his dissent in the *Johnson* case.

The decision of the majority of the panel of the Court of Appeals in the *Johnson* case held that "the individual aggrieved may file a suit in the District Court when he has received the statutory notice from the Commission and that he need not await an actual attempt from the Commission to achieve voluntary compliance." The Court reasoned that it would be unfair to an "aggrieved individual" to be required to wait upon the Commission to act. In skipping over the informal conciliation procedures, the Court saw no corresponding unfairness to the Company "for the reason that there is no right to persist in invidious discrimination." Thus, the Court erroneously assumed, without trial on the merits having been reached, that the Company is guilty of "invidious discrimination."

REASONS FOR GRANTING THE WRIT

The issues presented for review are by far the most frequently recurring and important issues which have come before the courts under Title VII of the Civil Rights Act of 1964.[1] There has been widespread confusion caused by the diversity of opinions rendered upon these issues.

The opinion rendered in the case of *Dent v. St. Louis-San Francisco Railway Co.*, 265 F. Supp. 56 (N.D. Ala. 1967) was the first to set forth a detailed analysis of legislative history of Title VII, and the conclusion was reached that efforts at involuntary settlement and negotiation were required of the Equal Employment Opportunity Commission prior to litigation of the alleged grievances. In *Mickel v. South Carolina State Employment Service*, 377 F. 2d 239 (4th Cir. 1967), the Court of Appeals spoke of *Dent* as a "well-considered case" which "painstakingly" presents "overwhelming authority culled from Congressional committee reports and the statements of key legislators to support the conclusion. . . ."

On the other hand, many of the decisions have allowed the Commission to skip over conciliation efforts altogether. Most of these decisions fail to discuss the legislative history, which clearly points to the opposite result.

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[1]The numerous federal decisions rendered upon these issues within the last two years are collected in the Petition for Certiorari in the case of *Pilot Freight Carriers, Inc., Petitioner v. Walker, Respondent*, filed in this Court on January 27, 1969. The writ is also being sought on these issues in *The Observer Transportation Company, Petitioner v. Lee, et al., Respondents*, filed in this Court on January 30, 1969.

In the case *sub judice*, the Commission admittedly made no effort to utilize the involuntary procedures set out in the statute. But Judge Craven, writing for the Court of Appeals in *Johnson*, ruled that skipping conciliation efforts did not offend the statute. He said the legislative history was "not so clear." He failed to explain his departure from the *Mickel* decision, which he had concurred in shortly before. No legislative history differing from that analyzed in *Dent* was presented to explain the variance.

The effect of the ruling of the Court of Appeals is devastating. The safeguards so carefully designed by Congress to protect employers and other persons subject to the provisions of the statute from subjection to the burden of frivolous claims and demands has been scrapped. Congress "leaned over backwards" to protect the possible defendants by providing for informal methods of conference, conciliation and persuasion before the "harsh action of a lawsuit." 110 Cong. Rec. 14190 (June 17, 1964, Senator Morse); *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184 (M.D. Tenn. 1966).

It was intended that charges filed with the Commission should not be made public until the opportunity had been extended to resolve the alleged grievance informally. §706(a), 42 U.S.C. §2000e-5(a). The conciliation step provided the means "to have the Commission settle the matter in an atmosphere of secrecy without resorting to the extreme measure of bringing a civil action in the congested federal courts." *Mickel v. South Carolina State Employment*

Service, 377 F. 2d at 241. By insuring that "the conciliation efforts must be conducted in confidence and not even the charge against the employer may be made public," §706(a), 42 U.S.C. §2000e-5(a); Memorandum, Senate Judiciary Committee, 110 Cong. Rec. 14331 (June 18, 1964), Congress provided protection against "enforcement by publicity." See Administrative Law Section, American Bar Association, 18 Adm. L. Rev. 75, 89 (1966); Rabkin, *Enforcement of Laws Against Discrimination in Employment*, 14 Buffalo L. Rev. 100, 111 (1964). "In the highly emotional area of equal rights unproven charges may lead to exceedingly adverse and unjust results." Administrative Law Section, *supra*. For this reason, the confidentiality provision was designed by Congress to prevent "the making available to the general public of unproven charges." 110 Cong. Rec. 12723 (June 4, 1964), Senator Humphrey).

The Commission was designed by Congress to seek informal cooperation and settlement, and its effectiveness will be severely impaired if a large portion of its cases harden into adversary proceedings. See, Administrative Enforcement of Anti-Discrimination Legislation, 74 Harv. L. Rev. 526, 573 (1961); Administrative Law Section, American Bar Association, 18 Adm. L. Rev. at 80, 100 (1966); Rabkin, *supra*, at 112. Furthermore, conciliation of the charges provides protection to the complainant also, for the publicity attendant to litigation often victimizes the complaining party. He may tend to become publicly

branded as a trouble-maker and an undesirable. Rabkin, *supra*, at 112.

By eliminating the necessity of efforts at conciliation prior to litigation, the Court of Appeals has effectively shorn the Commission of its primary function. The Court has reduced the Commission's function to the meaningless formality of issuing ex parte "reasonable cause" determinations. See Berg, *Equal Employment Opportunity: Procedures Under Title VII of the Civil Rights Act of 1964*, 55 Illinois B. J. 654 (1967). Thereby the primary task of enforcement of the Act has been shifted to the Federal judiciary. Surely no such burdening of the case-load of the federal courts was intended by Congress.

STATEMENT IN AMPLIFICATION OF REASONS WHY THE WRIT SHOULD ISSUE

All of the pertinent legislative history establishes that Congress intended that the informal efforts at conference, conciliation and persuasion should be attempted by the Commission prior to the institution of federal court proceedings. The legislative history has been set forth in extraordinary detail in *Dent v. St. Louis-San Francisco Railway Co.*, 265 F. Supp. 56 (N.D. Ala. 1967), and in the dissenting opinion of Judge Boreman in the *Johnson* case, printed in the Appendix to this Petition. All the commentators who have analyzed the statute and its legislative history pertaining to the conciliation issue have concluded that attempts to achieve voluntary compliance through conciliation must precede the institution of court action. Professor Sovern of the Columbia Law

School and legal consultant to the NAACP Legal Defense and Education Fund, in his recent treatise on this subject, writes as follows:

> "That the structure of §706, with its linkage of the individual suit to commission conciliation, leads naturally to the conclusion that the complainant cannot sue until the Commission takes the steps specified, could not have been lost on Congress. . . ." Sovern, *Legal Restraints on Racial Discrimination in Employment*, 82 (1966)

The Justice Department attorney who participated in the drafting of Title VII and served the Commission as Deputy General Counsel and General Counsel has explained that:

> "It is the intent of the statute to require the aggrieved person to delay his suit until the Commission has exercised its function of conciliation. . . ." Letter from Richard K. Berg as Deputy General Counsel of the Commission to the Labor Secretary of the NAACP. See further, Berg, *Equal Employment Opportunity: Procedure Under Title VII of the Civil Rights Act of 1964*, 55 Illinois B. J. 654, 655 (1967)

The majority opinion of the Court of Appeals in the *Johnson* case, upon which the Court rested its ruling

in the instant case, readily asserted that "quite obviously" the statute charges the Commission with the duty to make an attempt to achieve voluntary compliance. The Court stated "there can be no doubt that Congress intended to attack the problem of discriminatory employment practices by first seeking voluntary compliance by the nation's employers." Yet the Court allows the filing of suit without such voluntary compliance being sought. On the very same day that the parties were advised that conciliation endeavors were going to be made, the complainant was advised to proceed with litigation.

The Court of Appeals "found" that the Commission "was unable" to undertake conciliation attempts because of its "lack of appropriations and inadequate staff." There is no proof in the record to support any such finding as that, and certainly no such finding was made in the District Court.

The majority opinion of the Court of Appeals in *Johnson* found that the legislative history was "not so clear" because "either side can find statements that, *taken our of context*, support their position" (emphasis added). The Court quoted two isolated remarks of Senators Javits and Humphrey and concluded that these two statements caused enough "doubt" to cast aside all of the other legislative history which was so carefully analyzed in the *Dent* and *Mickel* cases.

When viewed in context, the statement of Senator Javits cast no doubt whatsoever that Congress intended the Commission to seek conciliation prior to suit. Senator Javits' remark was directed to a situation where the Commission had found no reasonable cause—a situation which does not exist in the instant case. See *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184 (M.D. Tenn. 1966). Judge Gray's decision in the *Hall* case, cited with approval in the majority opinion in *Johnson*, recognizes that the statement of Senator Javits sheds no light on the present question. Where the Commission has found reasonable cause, as it did in the instant case, Judge Gray agreed with the view here urged, that the Commission has the statutory duty to attempt conciliation before court proceedings are started.

> "The requirement of resort to the Commission was designed to give the discriminator opportunity to respond to persuasion rather than coercion, to soft words rather than the big stick of injunction. . . ." 251 F. Supp. at 188

Judge Gray has recently restated this conclusion in *Blue Bell Boots, Inc. v. Equal Employment Opportunity Commission*, — F. Supp. —, 58 LC ¶9139 (M.D. Tenn. 1968).

Furthermore, the statement of Senator Javits is fully consistent with the expressions of other senators that conciliatory efforts are a prerequisite when reasonable cause *is* found, for he said:

"The only thing this title gives the Commission is time in which to find that there has been a violation *and time in which to seek conciliation*. . . ."

110 Cong. Rec. 14191 (June 17, 1964) (Senator Javits) (emphasis added)

"We know that compliance in a particular situation may be better obtained by conciliation and accommodation, and that is the very purpose of the substitute package."

110 Cong. Rec. 13089-13090 (June 9, 1964) (Senator Javits)

Senator Javits played a leading role in assuring doubting members of the Senate that employers would not be harassed with "nuisance value" suits in the federal courts. He and Senator Humphrey pointed out that the compromise proposal was "based upon the accumulated experience of 25 states which have fair employment practices laws." 110 Cong. Rec. 13082 (June 9, 1964). Senator Javits assured the Senate that fears about the procedure of the compromise were not warranted because "in the 13 industrial states of the north, since the first law of this kind was passed, there have been 19,439 cases" and "only 18 have actually gone to court." 110 Cong. Rec. 13089-13090 (June 9, 1964). Senator Saltonstall added to this assurance with the statement that in Massachusetts "we have had experience with an arrangement of this sort for 17 years" and the Commission

has handled approximately 4,700 cases. "Only two of them have been taken to court for adjudication. That procedure is the basis and theory of this part of the bill and that is why I support it." 110 Cong. Rec. 14191 (June 17, 1964).

Only in those states whose laws have the "in advance thereof" clause—which was deleted from the bill passed by Congress—may court action be brought prior to conciliation efforts. See Sovern, *Legal Restraints on Racial Discrimination in Employment*, 24 (1966); Norgren & Hill, *Toward Fair Employment*, 264 (1964). The Senate relied heavily upon these assurances that employers would not be harassed with frivolous litigation and that the federal courts would not be flooded.

As to Senator Humphrey's statement that the individual may "bypass the Commission" and proceed "in his own right at any time," the majority opinion in *Johnson* first says that it is "inclined to accept" this statement as correct. However, the opinion goes on to a remarkable self-contradiction that "we have held, and now affirm, that the Commission cannot be bypassed entirely."

The statement of Senator Humphrey has been rejected as inaccurate by all who have examined it. It has been discredited by the Commission's General Counsel, by the Commission itself, and by the courts. G.C. Op., Oct. 7, 1965, CCH Employment Practices Guide, ¶17,251.083; Berg, *Equal Employment Op-*

portunity Under the Civil Rights Act of 1964, 31 Brooklyn L. Rev. 62, 83 (1964); Brief for the Commission in the *Dent* case, on appeal to the Fifth Circuit; *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184, 187 (M.D. Tenn. 1966). Attorneys for the plaintiff below admitted before the District Court in the *Dent* case that Senator Humphrey was incorrect, and neither cited nor relied upon Senator Humphrey's statement in the instant case. It is inconceivable that the majority in *Johnson* was "inclined to accept" this thoroughly discredited statement.

Congress took great pains to establish the intended meaning of the language of Title VII.

> "Seldom has similar legislation been debated with greater consciousness of the need for 'legislative history' or with greater care in the making thereof, to guide the Court in interpreting and applying the law."
>
> Vaas, *Title VII: Legislative History*, 7 Boston College L. Rev. 431, 434 (1966)

The issue presented in the present case was the subject of considerable attention. There were numerous statements by the law makers pointedly directed to the issue. The casting aside of all this legislative history on the basis of the two isolated statements of Senators Javits and Humphrey, admittedly taken out of context and not directed to the issue in question, is surely error which ought to be reviewed and rectified by this Court.

CONCLUSION

Upon all that is herein set forth, the Petitioner earnestly prays the Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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